(3)

NO. 84-654

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CHEVRON CORPORATION, et al.,

Petitioners,

vs.

STATES OF ARIZONA, CALIFORNIA, FLORIDA, et al.,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does a governmental entity have a right to jury trial under the Seventh Amendment?

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JURISDICTIONAL GROUND

Petitioners would invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

This case involves the Seventh Amendment to the United States Constitution.

STATEMENT OF THE CASE

The test for whether the Seventh Amendment right to jury trial obtains has been well settled in this Court and the rest of the lower courts for over 200 years. The test is the so-called historical test: what issues have traditionally been tried to juries at common law. In addition to the decision below, well reasoned decisions in the Third and Tenth Circuits have held that this historic right applies where a governmental entity brings a legal action in federal court. E.E.O.C. v. Corry Jamestown Corp. (3d Cir. 1983) 719 F.2d 1219; United States v. New Mexico (10th Cir. 1981) 642 F.2d 397. No conflict among in the Circuits nor any other policy reason requires this Court to reassess the well-established historical test of the right to jury trial.

Petitioners, the oil companies, argue that the history of the Seventh Amendment shows that it was intended only as a right of the individual; however, their version of the history of the Seventh Amendment is not only incomplete but also irrelevant to the issue

before this Court. While the Seventh Amendment clearly protects the citizen's right to jury trial, nothing in its language or history confines it solely to citizens or undermines the historic common law usage of juries in virtually all civil actions at law.

In arguing that the courts should now consider not only what is at issue but also who are the parties, petitioners postulate a radical departure from centuries of American as well as English jurisprudence. Their test would not only sweep aside the historic practice under the federal antitrust laws but also historic practice in all statutory and common law actions.

Underlying petitioners' argument is the idea that the sovereign which creates and controls the courts is not entitled to the protection or safeguard of jury trial. While this doctrine might have tenuous merit vis-a-vis the federal government, it has no merit with regard to state and local governments which are strangers to the federal courts.

Policy considerations as well as history argue against petitioners' attempt to constrict the states' right to a jury. The jury is the voice of the community in the judicial process. No useful purpose could possibly be served by muting that voice merely because a state seeks their judgment. Further, since the test defendants advocate potentially calls for a case-by-case determination of what type of

governmental entity is involved or whether an individual needs protection from oppression, it could introduce substantial uncertainty and unfairness into determining the right to a jury determination.

Few exceptions to the right to jury trial have historically been recognized in civil actions at law. Defendants have failed to establish by precedent or policy that such an exception should be recognized here.

Finally, the rights of citizens are indeed involved in this case. The states have sued on behalf of their citizens as class representatives and as parens patriae. Therefore, whatever arguments may support limiting the government's right to jury trial, none supports limiting the right of the citizens in this case.

ARGUMENT

I. THE TEST OF THE SEVENTH AMENDMENT RIGHT IS THE ISSUE TEST WHICH CLEARLY PROVIDES A JURY HERE.

From its earliest consideration of the matter, this Court has applied the issue test to determine the right to a jury: "[T]he Seventh Amendment question depends on the nature of the issue to be tried . . . ."[1/] Ross v. Bernhard (1970) 396 U.S. 531, 538;

1/ The language of Federal Rule of Civil Procedure 38 assumes that the historic issue test applies; Rule 38(b) states:

> "(b) DEMAND. Any party may demand a trial by jury of any issues triable of right by a jury . . . ."

Dimick v. Schiedt (1935) 293 U.S. 474; Parsons v. Bedford, Breedlove & Robeson (1830) 3 Pet. [28 U.S.] 433; Dairy Queen, Inc. v. Wood (1962) 369 U.S. 469.

Without exception, the federal courts have found that the issue test mandates a jury trial in antitrust damage actions. See Fleitman v. United Gas Improvement Co. (2d Cir. 1914) 211 F. 103, 105, affd. (1916) 240 U.S. 27, 29; Curtis v. Loether (1974) 415 U.S. 189, 195-96.

Since this case is undeniably an antitrust damage action, the issue test would clearly mandate a jury trial here.

II. FEDERAL, STATE AND LOCAL GOVERNMENTS ARE ENTITLED TO A JURY IN FEDERAL COURT FOR ACTIONS AT LAW.

Contrary to the oil companies' arguments, the issue test of the jury right is the only applicable test when a government entity litigates in federal court. This principle is based on a substantial body of American jurisprudence which gives domestic as well as foreign governmental bodies the same rights as individuals to assert claims under federal law. See Pfizer Inc. v. Government of India (1978) 434 U.S. 308, 315-320; E.E.O.C. v. Corry Jamestown Corp. (3d Cir. 1983) 719 F.2d 1219; United States v. State of New Mexico (10th Cir. 1981) 642 F.2d 397.

In United States v. State of New Mexico, supra, the Tenth Circuit held that the federal

government's suit to recover unlawfully collected taxes was historically an action at law and that the right to jury trial was secured in such an action by the Seventh Amendment. 642 F.2d at 402.

More recently, in E.E.O.C. v. Corry Jamestown Corp., supra, the Third Circuit held that the E.E.O.C., a federal commission, had a right to a jury trial under the Seventh Amendment:

> "To say that the Commission may not rely on the Seventh Amendment would be to ignore the historical development of the right to jury trials in civil actions." 719 F.2d at 1224.

The New Mexico and Corry Jamestown cases are not isolated holdings. American jurisprudence, following English practice, has long recognized that government entities, be they federal, state, local or foreign, enjoy the same rights and privileges as individuals when they bring suit in federal court.

It is well settled that the federal government may institute a common law action on the same basis as an individual. In Dollar Savings Bank v. United States (1873) 19 Wall. (86 U.S.) 227, this Court held that, based on historic English doctrine, the United States could bring a common law action for debt to collect taxes, even though the government was not specifically authorized to bring that form of action under the tax statute: "He [the King] may even take the benefit of any action though not named. The rule . . . is equally

applicable to this government." 19 Wall. (86 U.S.) at 239.

Historically, the rights and privileges of individuals have also been extended to foreign sovereigns:

> "To allow a foreign sovereign to sue in our courts for treble damages to the same extent as any other person injured by an antitrust violation is thus no more than a specific application of a long-settled general rule." Pfizer v. Government of India, supra, 434 U.S. at 318-19, (emphasis added).

The right was previously given to state and local governments who were deemed "persons" with standing to bring suits under the federal antitrust laws. Georgia v. Evans (1942) 316 U.S. 159; Chattanooga Foundry & Pipe Works v. City of Atlanta (1906) 203 U.S. 390.

Since Chattanooga, supra, the states in this action and many other state, local and governmental entities have routinely tried numerous federal treble damage actions before juries. The right to a jury in these cases is an inherent aspect of the states' standing to bring this type of action.

In other areas, the federal courts have recognized that the states are entitled to some of the same rights as citizens under the federal scheme. In State of California v. United States (9th Cir. 1968) 395 F.2d 261, the court held that California was entitled under the Fifth Amendment to compensation from the

federal government for the taking of land, even though the Amendment states: "nor shall private property be taken for public use, without just compensation." See United States v. Carmack (1946) 329 U.S. 230, 242; City of St. Louis v. Western Union Telegraph Co. (1893) 148 U.S. 92, 101.

Although the Sixth Amendment provides a jury trial to the "accused," this Court has held that the federal government has the right to insist upon a jury trial despite defendant's waiver:

> ". . . the Government has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal [a jury] which the Constitution regards as the most likely to produce a fair result." Singer v. United States (1965) 380 U.S. 24, 36.

III. THE HISTORY OF THE SEVENTH AMENDMENT: THE RIGHT TO JURY TRIAL WAS NOT LIMITED TO CITIZENS.

Although the history surrounding the adoption of the Seventh Amendment shows concern for the citizens' rights, the Amendment both secures those rights and incorporates the broader practice at common law.

Much of the impetus for adopting the Seventh Amendment came from colonists, mostly anti-federalists, who feared the power of the emerging federal government. This was the case, because the newly drafted Constitution did not mention jury trials. However, the language adopted in the Seventh

Amendment and the surrounding history do not indicate that the Amendment was intended to operate solely to protect the individual against the government. See Wolfram, Constitutional History of the Seventh Amendment (1973) 57 Minn.L.R. 639 (hereinafter Wolfram).

While many colonial and territorial charters, resolutions, and tracts at that time spoke in terms of the people, citizens, persons, "man and man," none of this language was used in the Seventh Amendment. See Wolfram, supra, 57 Minn.L.R. 639. Other Amendments in the Bill of Rights use the terms people, person, the accused, yet the language of the Seventh Amendment that was finally adopted does not speak merely to the rights of the citizens or people: "[i]n suits at common law the right of trial by jury shall be preserved."[2/]

2/ Construction of similar language in the Fifth Amendment led the court in State of California v. United States (9th Cir. 1968) 395 F.2d 261, to conclude that California had a right to just compensation for a taking by the federal government.

Although the Sixth Amendment gives the "accused" the jury right in criminal cases, the government, nevertheless, has the right to demand a jury. Singer v. United States (1965) 380 U.S. 24, 36. This language represented a congressional committee revision which dropped James Madison's proposal using the words "between man and man." Since there is no record of debate in Congress or in the colonial ratification proceedings of the proposed or final wording, the immediate legislative history is not helpful. Wolfram, supra, 57 Minn.L.R. at 725-730, citing 1 Annals of Cong. at 435, 447, 767.

Elbridge Gerry, a member of the congressional committee that drafted the final language of the Amendment, and Alexander Hamilton favored the jury trial on general fairness grounds. Both thought that judges were more likely to be corrupt or biased than juries. The fairness concern applies whether the government or a private party is involved. See Wolfram, supra, 57 Minn.L.R. at 709-710, citing 2 Records of the Federal Convention of 1787, at 587 (M. Farrand ed. 1911) and The Federalist No. 83, at 563-64 (J. Cooke ed. 1961). See also Higginbotham, Continuing Dialogue: Civil Juries and the Allocation of Judicial Power, (1977) 56 Tex.L.R. 47.

The most reasonable conclusion from the language and all the circumstances is that the Seventh Amendment was not limited to giving citizens the right to a jury but that the broader common law usage was adopted.

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IV. THE RIGHT TO JURY TRIAL AT COMMON LAW IS DETERMINED BY HISTORICAL USAGE IN ENGLAND.

In suits at common law, the Seventh Amendment "preserves" the right to jury trial. The language suggests a neutral design for the amendment, neither expanding nor contracting this right to jury trial as it existed in 1791. As this Court stated in Atlas Roofing Co. v. Occupational Safety Comm. (1977) 430 U.S. 442, 459-60. "The Seventh Amendment was declaratory of existing law . . . It took the legal order as it found it . . . ." See generally Jorde, The Seventh Amendment Right to Jury Trial of Antitrust Issues, 69 Cal.L.R. 1.

To understand and give content to the scope of the right that is preserved, this Court has made clear that reference must be made to the common law of England as it existed in 1791, the year the Seventh Amendment was adopted. The essence of this Court's historical approach to the Seventh Amendment is thus an inquiry into what matters were actually decided by English juries in 1791. United States v. Wonson (C.C.D.Mass. 1812) 28 F.Cas. 745, 750; Capital Traction Co. v. Hof (1899) 174 U.S. 1, 8; Baltimore & Carolina Line v. Redman (1935) 295 U.S. 654, 657; Dimick v. Schiedt (1935) 293 U.S. 474, 476; Parklane Hosiery Co., Inc. v. Shore (1979) 439 U.S. 322, 344-45.

Most commentators have acknowledged the primacy of the historical test in the Seventh Amendment jurisprudence.3/

While the petitioner oil companies have cited many colonial and territorial charters, constitutions and other documents on securing the right of jury trial to the people, the practices and intentions of the colonists have not been used by the courts to determine the application of the Seventh Amendment. In the first case to construe the language of the Seventh Amendment, Mr. Justice Story stated:

> "Beyond all question, the common law here alluded to [in the Seventh Amendment] is not the common law of any individual state, (for it probably differs in all), but is the common law of

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3/ F. James & G. Hazard, Civil Procedure (1977) section 8.1, at 347-48; Moores Federal Practice (2d ed. 1980) Vol. 5, ¶ 38.08 [5.-4] (hereinafter Moores); 9 C. Wright & A. Miller, Federal Practice and Procedure (1973) section 2309, at 14; Wolfram, supra, 57 Minn.L.R. at 639-45, 648-49, 720-21; Henderson, The Background of the Seventh Amendment (1966) 80 Harv.L.R. 289; McCoid, Procedural Reform and the Right to Jury Trial, etc. (1967) 116 U.Pa.L.R. 1, 1-2; Shapiro & Coquillette, The Fetish of Jury Trial In Civil Case, etc. (1971) 85 Harv.L.R. 442, 448.

England . . . ."[4/] United States v. Wonson, supra, 28 F.Cas. 745, 750.

Accord, Colgrove v. Battin (1973) 413 U.S. 149, 154-55; Capitol Traction Co. v. Hof, supra, 174 U.S. at 8; Wolfram, supra, 57 Minn. at 641, 731. "No federal case decided after Wonson seems to have challenged this sweeping proclamation." Id., at 641.

V. THE GOVERNMENT IN ENGLAND WAS HISTORICALLY ENTITLED TO A JURY IN ACTIONS AT LAW: THE UNITED STATES ADOPTED THIS PRACTICE.

Jury trials originated as a prerogative and tool of the Crown: ". . . the king gave out the privilege, for private litigation . . . . Henry (II) made jury trial a constant legal right instead of occasional boon." Rembar, The Law of Land (1980); Plucknett, A Concise History of the Common Law, (2d 1936) pp. 105-106. As petitioners have shown, that right was gradually secured to the people by such charters as the Magna

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4/ Defendants have cited a New Hampshire case, Wooster v. Plymouth (1882) 62 N.H. 193, for the proposition that the government has no constitutional right to jury trial. Since constitutions and constructions of the common law differed in the various colonies (and thereafter in those states), this precedent is not relevant in construing the United States Constitution; United States v. Wonson, supra; Wolfram, supra. Furthermore, decisions on the rights and powers of a sovereign or government in its own courts are of little use here where the governments in this case are not in their own courts; see Part VII, infra.

Carta. Thus, contrary to petitioners' contention, entitlement to a jury was never lost to the Crown or the government.

In eighteenth century England as in centuries past, how civil suits were tried was determined in the same fashion regardless whether the government or an individual asserted claims. The right to a jury was determined by the issue not the party. Trial was before a jury where the suit was an action in the courts of law as opposed to an equitable action in the chancery courts.

The Crown had the prerogative of suing in any court he pleased:

> "It is the prerogative of the King that he may sue in any court he pleases." Brownloe v. Milchell (1616) 1 Roll.Rep. 288, cited in Butterworths, The English and Empire Digest (1975), Vol. 11, Part VIII, sect. 5, sub. 2, p. 703 (hereinafter Butterworths). Walwin v. Brown (1461) Y.B. 39 Hen. 6, fo. 26, pl. 36 cited in Butterworths, supra, Vol. 11 at 703.

However, the Crown's prerogative did not determine the mode of trial but merely the forum. In actions at law, the Crown or government had a historic right to a trial at bar which was a trial before two judges and a jury. Halisbury's Laws of England 4th (1974) Vol. 8, § 1280, p. 792, citing A.G. v. Walsh (1832) Hayes & Jo 65; Halisbury's, supra, Vol. 11, § 1406, p. 745; Dixon v. Farrer (1886) 18 Q.B.D. 43, cited in Butterworths, supra, at 703; Paddock v. Forester, 1 M.

& G. 583, cited in Fisher's Harrison Digest 1856-1870, Vol. 4, p. 8427.

In addition to the right to trial at bar, the Crown had the prerogative of removing all causes affecting Crown property to the exchequer courts, where trial of issues of fact was to a jury. A.G. v. Constable (1879) 4 Ex.D. 172, cited in Butterworths, supra, Vol. 11, at 703-4; see United States v. Athens Armory (N.D.Ga. 1868) 24 F.Cas. 878, cited infra, p. 23. The English exchequer courts were the forum in which the Crown customarily sued to collect taxes and confiscate property.

The practice in England was adopted by our federal courts in confiscation cases brought by the federal government:

> "The principles governing the district courts of the United States in the determination of seizures of this kind are in accordance with the common law, and the trial has, hitherto, been in pursuance of the manner of the English exchequer on informations in rem. [sic] where the decision of issues of fact devolve on a jury. U.S. v. The Betsey, 4 Cranch [8 U.S.] 443; Six Hundred and Fifty-One Chests of Tea v. United States, [Case No. 12,916]; U.S. v. Fourteen Packages, [Id., 15,151]; The Sarah, 8 Wheat. [21 U.S.] 391." United States v. Athens Armory (1868) 24 F.Cas. 878, 881, Case No. 14,473.

See also C.J. Hendry Co. v. Moore (1943) 318 U.S. 133.

In tax as well as confiscation cases brought by the United States, the courts have held that they are actions at law and that the ". . . issues of fact, on demand of either party, must be tried by jury." Union Ins. Co. v. United States (1867) 6 Wall. [73 U.S.] 759, 764; Armstrongs Foundry (1867) 6 Wall. [73 U.S.] 766, 769; United States v. Hart (1867) 6 Wall. [73 U.S.] 770, 773; The Sarah (1823) 8 Wheat. [21 U.S.] 391, 392; Shawnee Nat. Bank v. United States (8th Cir. 1918) 249 F. 583, 585; see also Damsky v. Zavatt (2d Cir. 1961) 289 F.2d 46, 49-51 (action by United States for taxes; this case contains a lengthy discussion of the use of juries in the English exchequer courts); United States v. Lyman (C.C.D.Mass. 1818) 26 F.Cas. 1024.

VI. THE LONE PRECEDENT CITED BY DEFENDANTS DOES NOT SUPPORT DENIAL OF A JURY IN CASES BROUGHT BY THE GOVERNMENT.

Defendants have cited only one federal case, United States v. Griffin (W.D.Va. 1926) 14 F.2d 326, for the general proposition that the government has no right to jury trial. Since Griffin, supra, involved condemnation by the government, an issue which was not historically tried to a jury, it cannot, by any reasonable stretch of the imagination, stand for the broad principle that the government is, in general, not entitled to a jury:

> "It may be taken as settled that there is no constitutional right to a jury trial in an action by

> the United States to condemn property under the power of eminent domain. . . ." 5 Moores, supra, ¶ 38.32 [1], pp. 38-250 through 38-251.

As explained below, Griffin, supra, is an anomaly that stands for very little.

At the outset we note that the Griffin case has never been cited by a single federal court for the broad proposition that governmental entities do not have a right to jury trial. Indeed, the trial court actually assumed that the government had a general right to jury trial in civil cases, but believed that the right existed historically at common law or was granted by statute:

> "But the right of govenment to a jury trial, when it exists, is given by common law and by statute, and was not, because of the intent and purpose of the Seventh Amendment, given by the Constitution. The simplest and best reason for saying that the Seventh Amendment does not preserve a right in the government to trials by jury is that there was not the slightest need for such intent. . . ." 14 F.2d 326, at 327.

However, the Griffin court misconstrued the scope of the Seventh Amendment. Since the Seventh Amendment preserves the right as it existed at common law, it also secured that right to the government.

The apparent reason that the court interpreted the Seventh Amendment as it did was to

provide a non-constitutional ground for holding that the Weeks Act condemnation procedures, which did not provide for jury trial right, superseded any earlier common law or statutory jury right that the government had. If the government's jury trial right were preserved by the Seventh Amendment, then the court would have had to acknowledge and deal with the inconsistency of the Weeks Act provisions and the Seventh Amendment.

The court's alternative holding actually met the issue head-on, finding that even if the government has a Seventh Amendment right, Congress had waived it, because the Weeks Act provided no jury trial.

VII. THE GOVERNMENTAL PLAINTIFFS IN THIS CASE ARE NOT THE SOVEREIGN THAT DEFENDANTS' THEORY ADDRESSES.

Underlying the oil companies' argument is the idea that the jury is a protection from the sovereign who controls the courts:

> "I believe the great mass of the people who opposed it [the Constitution] dislike it because it did not contain effectual provisions against the encroachment on particular rights and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power." 1 Annals of Cong. 433 (1789) (Speech of James Madison to the first Congress which considered the initial amendments to the Constitution.)

State and local governmental entities do not, of course, control the federal courts. When they sue in their proprietary capacity for damages, they suffer the same disabilities and need the same protections as citizens. Both are strangers to the federal system.

In Georgia v. Evans, supra, 316 U.S. 159, the Supreme Court recognized that a state is not like the federal government and has the same need for federal rights under the antitrust laws as the individual does:

> "The State of Georgia, unlike the United States, cannot prosecute violations of the Sherman Law. Nor can it seize property . . . ." 316 U.S. at 162.

This case recognized that the federal government had the power to define the nature of rights and actions in its own courts, while states and other governments may not do so in federal court. Thus, the federal government may, by statute, provide itself with a jury in any case where such right may be in doubt.

VIII. POLICY CONSIDERATIONS.

In postulating that only individuals have the right to a jury under the Seventh Amendment, petitioners argue for nothing less than a basic reassessment of the traditional issue test that has been long settled in English and American jurisprudence. In arguing for a test based generally on the identity of the parties, petitioners would repudiate the historic issue test and dramatically contract the scope of jury right.

In addition, the right would be subject to potential uncertainty and discriminatory application. Before this important right is changed or constricted, a number of policy considerations should be explored:

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history that any seeming curtailment of the right to jury trial should be scrutinized with the utmost care." Dimick v. Schiedt, supra, at 293 U.S. 474, 486.

Petitioners have raised some unsettling problems in advocating their new test for the right to a jury. If the jury right was designed solely to protect the individual from government oppression, how then do we analyze the great mass of cases that involve only individuals? If the government is involved must we provide a jury only when there is a potential for oppression flowing from the nature of the government entity's sovereignty or the nature of the case? How do we measure the potential for oppression? One might question whether a large institution or corporation needs protection from oppression. The petitioning oil companies are economic entities larger than many nations. Under their test would such companies, just as foreign and domestic governments, be denied the jury right?

In characterizing the jury as merely an individual's shield from oppression, the oil companies have ignored the broader function of the jury. A jury insures that court decisions will reflect community values. The interest of litigants in having a community-based jury find the facts in a given case is as important to governmental entities as it is to their citizens. Governmental entities are as concerned as citizens that important cases be decided by a community-based jury, the fact-finder considered most fair by the Constitution. See Singer v. United States, supra, 380 U.S. at 36.

Petitioners have made a forceful case for securing the jury right to individuals. However, that is not the issue here; no individual's right to a jury is now in jeopardy. What is in issue, indeed in jeopardy, is the historic use of the jury in virtually all civil actions at law. Under the guise of protecting individual rights, defendants would now limit the jury's historic role. To what purpose? Even if one accepts the proposition that the jury shields the individual against government oppression, how can oppression occur if a jury is provided rather than denied?

History has recognized very few exceptions to the jury right in civil actions at law. See 5 Moore,

supra, ¶ 38.08; Millar, Civil Procedure of the Trial Court in Historical Perspective (1952) p. 260. Petitioners have failed to show that history or policy supports an exception here.

IX. THE STATES' CLAIMS FOR THEIR CITIZENS PARENS PATRIAE AND AS CLASS MEMBERS ARE ENTITLED JURY TRIAL.

In addition to making damage claims for state and local government purchases, the states claim damages on behalf of their citizens as class members and parens patriae (pursuant to 15 U.S.C. § 15(c) and various state law provisions). Defendants have not challenged the well-settled principle that citizens are entitled to a jury trial in damage actions under the antitrust laws. The court below reasoned correctly that the citizens in this case must not be denied a jury simply because others represent them:

> ". . . the Supreme Court has held that the right to jury trial on underlying claims is unaffected by the fact that suit is brought by someone acting in a representative capacity . . . ." Ross v. Bernhard, 396 U.S. 531 (1970).

Similarly, in E.E.O.C. v. Corry Jamestown Corp. (3d Cir. 1983) 719 F.2d 1219, 1225, the Third Circuit held that when the Equal Employment Opportunity Commission brings suit on behalf of a victim of age discrimination, the Commission is entitled to a jury trial. The Court explained that it

would be inequitable and anomalous to hold that an individual otherwise entitled to a jury trial is deprived of that right because the Commission choose to bring suit on his behalf." (Petitioners' Appendix, at A-23; 738 F.2d at 1031.)

Here it would also be anomalous to deny the right to a jury. Since individual citizens would have the right to a jury trial on their individual claims, that right should not be affected by the fact that the states are bringing claims on their behalf.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: November 20, 1984.

Respectfully submitted,

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